

14-1255

IN THE CIRCUIT COURT OF RITCHIE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel. GREGG D. SMITH,
Petitioner,

vs.

CASE NO. 11-P-19

PATRICK A. MIRANDY, Warden,
St. Marys Correctional Center,
Respondent.

FINAL ORDER GRANTING HABEAS CORPUS RELIEF

This matter came on before Special Judge Larry V. Starcher for the Circuit Court of Ritchie County, West Virginia, on April 22, 2014, following the entry of an Order in this matter dated November 7, 2013 (entered November 12, 2013), at the request of the State, by counsel Steven A. Jones, in its pleading titled "State's Objection to the Court's Order Granting Habeas Corpus Relief and Request for Hearing." The Petitioner Gregg D. Smith, by counsel Matthew T. Yanni, also came in response to the State's request and with the filing of "Petitioner's Motion to Amend the Findings and Judgment" of the November 7, 2013 Order.

History

This matter has had a long, troubled history beginning with one Prosecuting Attorney, then a second, then back to the original Prosecutor. Looking to the origins of the case, the Petitioner declined to accept a quite defendant-favorable plea agreement, went to trial, and was

convicted on September 5, 2008 on four felonies (all really within a single event). For pre-trial matters the defendant (now Petitioner) was represented by employed lawyer number one, for the trial he was represented by court-appointed lawyer number two, and for sentencing represented by court-appointed lawyer number three.

Several months following the convictions the Petitioner was sentenced to consecutive sentences on the four convictions – Malicious Assault (with a hammer), Malicious Assault (with a gun), Wanton Endangerment Involving a Firearm, and Attempted First Degree Murder. With this Petition for Habeas Corpus Relief, the Petitioner now has his fourth lawyer during the course of the case.

Petitioner, by his fourth counsel, filed an Omnibus Habeas Corpus Petition. It is that Petition that the court continues to address. After taking evidence at a hearing that was held on two separate dates – May 22, 2013 and July 24, 2013 – the court signed its November 7, 2013 Order (entered on November 12, 2013) announcing its rulings on the issues raised by the Petitioner, hoping the matter was resolved.

In its November 7, 2013 Order, the court was attempting to provide the Petitioner some very modest relief for three reasons: first, the Petitioner was not persuaded (by counsel) to accept an attractive plea offer at the initial stages of the case, nor does a review of the record suggest that any of Petitioner's counsel vigorously pursued the recusal of the judge.

Second, in not granting Petitioner's request for relief on his claim of ineffective counsel¹, this court believes that in looking at the record as a whole, a reasonable person might question

¹Recognizing that if permitted to stand on appeal, the likely result could be a second costly trial.

the wisdom of this decision. One only has to look to the closing argument² made by defense counsel to draw a conclusion as to the quality of representation the Petitioner was provided. (Also see pp. 6-7, Order dated November 7, 2013).

The third reason this court was attempting to provide some modest relief to the Petitioner was because the court was reluctant to read into the record of the case that the trial judge who

²During trial, Defendant's counsel failed to offer any jury instructions, and offered the following closing argument on behalf of Petitioner:

So you know, I don't know why Gregg Smith went after him with a hammer. I don't know, none of us know, you know, what he had been through for the year prior. Who knows? But I know that he was charged with a felony and a jury found him not guilty and he could not get what he needed. If somebody had prosecuted him that had battered him, we don't know what would have happened. We don't know if that would have stopped the things between these people or not. The fact is he was battered and the battery went on. Yeah, he lost his leg, but he had not lost his leg when he was a batterer . . .

They have to prove to you, the state does, beyond a reasonable doubt, beyond a reasonable doubt. You know, you can't just say I dislike Gregg Smith and find him guilty of two counts of malicious assault and wanton endangerment. You can't dislike him and do that. You can't dislike me and not do that. You have got to have proof that in your own heart there is no reasonable doubt that he had the maliciousness to do this, that he had intent to kill Tom Smith. I think you all know that. And I am sorry if it sounds like I am yelling at you, but this is a lot of pressure here, you know. This man's life is in your all's hands through me trying to communicate to you. His whole future is in your hands and, yes, it makes us a little bit nervous when we have to defend this. I think the case is overcharged. You know, did he really --? Should we have charged him with attempted murder? You have seen the video. You know, is this attempted murder? Is it even malicious assault? It might have been attempted malicious assault with a hammer. Now as far as, as far as the wanton endangerment goes here we have the gun then we see Tristan coming over. I don't recall, and you all are the ones that matter, not me, but I don't recall there was any evidence that Tristan was outside whenever the gun went off. You know, what about Emily? I am sorry, not Emily. Edith, what about little Edith who did testify? She was on the porch. You know, they could have charged him with wanton endangerment of her. But they did not. They charge wanton endangerment of Tristan. . . .

Gregg Smith was honest about the 911 call even though he was wrong. He stated Tom went for the hammer and he took it away from him, or something to that effect. That was not on the video. It is not true. Was he lying to 911? I mean, think what I am saying here. Would he lie about going for the hammer or not going for the hammer? Would he intentionally say to police and troopers what he was saying -- I shot him? I am Gregg Smith. I shot Tom Smith. No, I don't think that makes any sense. If you listen to that 911 tape, you will hear how excited, what an excited state he is in. His breathing is about as loud as his words. . . .

No, you are not, you are not across the street from my house. See what happens when people are, they are so upset they are out of their minds? He was obviously across the street from his house. Many people are in just a crazy state and that is what happens, you know, when things go this far. It is a tragedy but I don't know of somebody that we can point a finger at and put it on them.

And I respectfully suggest to you that Gregg Smith is not guilty of what he is charged with. He is guilty of stupidity. He is guilty of something, but he is not guilty of what he is charge with folks. Thank you very much.

tried the case was mandated to have voluntarily recused himself – while believing that many, if not most, judges facing the same facts would have stepped aside.

But in the final analysis, even though more professional, or more skillful attorneys might have achieved a different result with a reasonable degree of probability, other than as to the double jeopardy claim, the overwhelming weight of the evidence against the Petitioner would have likely resulted in the convictions of some or all of the charges. For this reason, the court found in its November 7, 2013 Order that the results of the trial court were reliable and reluctantly rejected the Petitioner's claim of ineffective assistance of counsel.

Petitioner's Motion to Amend The Findings and Judgment
[of the November 7, 2013 Order]

Following the November 7, 2013 Order the Petitioner moved to amend the findings and judgment of that Order, arguing that to allow the particular trial judge who tried the Petitioner to sit on the case was a structural error, and thus subject to automatic reversal. The court permitted counsel to make his argument.

The Petitioner previously had argued that the trial judge was biased against Petitioner because the judge, and his family, had an interest in the outcome of Petitioner's criminal case in seeing that Petitioner no longer impeded the access of the Murvin and Meier Oil Company to the judge's family's well site. The oil company was the plaintiff and the Petitioner the defendant in a Doddridge County civil action in which the access issue was being litigated.

In its November 7, 2013, this court found that Petitioner waived the determination of the disqualification issue under *State v. Miller*. 194 W.Va. 3, 459 S.E.2d 114 (1995). (See the November 7, 2013 for a full discussion). At this April 22, 2014 hearing, the Petitioner urged the

court to reconsider its decision on the waiver issue, in light of *Neder v. United States*. 527 U.S. 1, 119 S.Ct. 1827.

After reconsidering the issue, and recognizing that the issue will likely be reviewed, this court again finds that Petitioner overtly waived his right to seek the disqualification of the trial judge by not moving for disqualification from the case.

State's Objection to the Court's Order Granting Habeas Corpus Relief

The State of West Virginia objected to the court's November 7, 2013 Order's ruling on Petitioner's double jeopardy claim arguing that he failed to make a *prima facie* case of a double jeopardy violation. The State urged the court to find that there was no double jeopardy violation because Petitioner was charged and convicted of committing Malicious Assault with a shotgun against Thomas F. Smith, and was charged and convicted of Wanton Endangerment Involving a Firearm for creating a risk of death or serious bodily injury to TCS, the son of Thomas F. Smith. The State argued that "the elements of malicious assault and wanton endangerment involving a firearm are different in the instant case because you have two different victims. The two victims make a difference and change the elements of each offense." (See State's Memorandum of Law, p. 2).

This Court declines to adopt the State's argument for reasons previously stated in it November 7, 2013 Order and hereby incorporates in this Order the findings and rulings of the court on the double jeopardy issue from the November 7, 2013 Order. All evidence before this court is that the firing of the shotgun that injured Thomas F. Smith and the "endangerment" to his son both grow out of a single volitive act, and the State of West Virginia has not borne its burden to show otherwise. Nor has the State provided the court any law that specifies that for

double jeopardy to be applicable the victim of the lesser included offense must be the same person as the major offense.

Accordingly, one of the two convictions in issue and its sentence must be dismissed. The court relies *State v. Wright*, 200 W. Va. 549, 553-554, 490 S.E.2d 636, 641(1997) and *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980) in support of it conclusion.

Therefore, this court **Orders** that the State of West Virginia must dismiss one of these two convictions – malicious assault or wanton endangerment involving a firearm – within ten (10) days of the date of the entry of this order. Should the State of West Virginia not dismiss one of these two convictions within ten (10) days of the date of this Order, the court further **Orders** that the Petitioner will have the option to choose between malicious assault and wanton endangerment involving a firearm to be the conviction and sentence which will be dismissed.

It is further **Ordered** that the Clerk of this Court shall provide a certified copy of this Order to the attorneys in this matter at the following addresses:

For the State:

Steven A. Jones, Esq.
Ritchie County Prosecutor
Ritchie County Courthouse
Harrisville, WV 26362

For the Defendant:

Matthew T. Yanni, Esq.
Yanni Law Firm
211 ½ West Burke St.
Martinsburg, WV 25401

Enter: *November 7, 2014*

Larry V. Starcher
Special Judge Larry V. Starcher

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: Rose Ellen Cox

Ritchie County of West Virginia

ENTERED ON *11/12/2014*

IN *CO* Order Book No. *48*

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On the 22nd day of May, 2013, and on the 24th day of July, 2013, the Petitioner, Gregg D. Smith, by counsel, Matthew T. Yanni, and the State of West Virginia, by counsel, Steve Jones, Ritchie County Prosecuting Attorney, came before this Court for an Evidentiary Hearing pursuant to the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia. At the Evidentiary Hearing, this Court inquired on the record as to whether the Petitioner had raised all available grounds for habeas corpus relief. The Petitioner argued that his counsel had not raised all available grounds and this Court allowed the Petitioner to supplement the record with all grounds not raised by his counsel. Although the Petitioner did not wish to waive any grounds for habeas corpus relief not asserted, this Court informed the Petitioner that all grounds not raised would be waived.

Previously, on the 20th day of March, 2013, the Petitioner filed a **Motion to Amend Omnibus Petition** and an **Amended Omnibus Petition**. This Court permitted the State of West

Virginia to respond to the **Amended Omnibus Petition** orally. The Petitioner also filed a **Memorandum of Law in Support of Petition for a Writ of Habeas Corpus** on the 24th day of July, 2013. The State of West Virginia requested one month to respond to the **Memorandum of Law in Support of Petition for a Writ of Habeas Corpus**; the State of West Virginia ultimately chose not to file a response. Approximately three months have passed since the conclusion of the Omnibus Habeas Hearing and this matter is ripe for decision.

The Petitioner, by counsel, alleged three errors of constitutional dimension that occurred in Case No. 07-F-43 in his **Amended Habeas Petition and Memorandum of Law in Support of Petition for a Writ of Habeas Corpus**. The Petitioner presented what he perceived as other errors of constitutional dimension in Case No. 07-F-43, but after reviewing those perceived errors this Honorable Court denies relief on those grounds presented by the Petitioner. The Petitioner, by counsel, presented evidence and argued that he was denied due process of law, that he received ineffective assistance of counsel, and that the State of West Virginia violated the Petitioner's protections against double jeopardy. This Court, being of the opinion that the Petitioner was not denied due process of law or the effective assistance of counsel rejects those allegations of the Petitioner. However, this Court finds that the State of West Virginia has violated the Petitioner's protections against double jeopardy and finds in favor of the Petitioner on this allegation.

Due Process of Law

The Petitioner presented evidence that he was denied the due process of law under the Fourteenth Amendment of the Constitution of the United States of America and under the West Virginia Code of Judicial Conduct because the trial court judge in Case No. 07-F-43, the

Honorable Robert L. Holland, Jr., should have disqualified himself from the Petitioner's criminal trial because the Honorable Robert L. Holland, Jr., and his family, had an interest in the outcome of a then pending suit between *Murvin & Meier Oil Company, an Illinois Corporation vs. Gregg Smith*, Doddridge County Civil Action No. 05-C-38. To establish that his due process rights were violated, the Petitioner introduced a copy of his **Arrest Order** in which the Honorable Robert L. Holland, Jr., inquired of Gregg D. Smith whether Mr. Smith "intended to make a motion before the Judge of this Court to recuse himself from this case. The Defendant responded through Counsel and his own proper person that he did not intend to ask the Judge to recuse himself from this case." The Petitioner also introduced a transcript of hearing before the Honorable Robert L. Holland, previously the Judge in the case of *Murvin & Meier Oil Company, an Illinois Corporation vs. Gregg Smith*, Doddridge County Civil Action No. 05-C-38, and an **Administrative Order**, from the Supreme Court of Appeals of West Virginia, which deemed the Honorable Robert L. Holland's request for recusal from that case warranted and appointed the Honorable John Lewis Marks, Jr., to the case.

At the 2013 *habeas corpus* evidentiary hearings, the Petitioner called his each of his three attorneys to testify. George J. Cosenza represented the Petitioner at the time of his arraignment and testified that the Petitioner never informed George J. Cosenza of the *Murvin & Meier Oil Company* case and that the Petitioner never requested that George J. Cosenza make a motion for disqualification of the Honorable Robert L. Holland, Jr. The Petitioner's second lawyer who was is trial counsel, Jerry Blair, made statements to the same effect. Petitioner's counsel for sentencing and appeal, Rocco E. Mazzei, testified to the same. All attorneys also testified to the goodness and fairness of the Honorable Robert L. Holland, Jr. The Petitioner testified that the Petitioner did object to the Honorable Robert L. Holland, Jr., hearing the case, but based upon

the statements of the Petitioner's attorneys to the contrary, this Court finds that the Petitioner did not object to the Honorable Robert L. Holland, Jr., hearing Case No. 07-F-43.

Waiver is the "intentional relinquishment or abandonment of a known right." *State v. Miller*, 194 W.Va. 3, 18, 459 S.E.2d 114, 129 (1995). "When there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined." *Id.* Because the Honorable Robert L. Holland, Jr., inquired of Petitioner and his then counsel, George J. Cosenza, whether they intended to make a motion before the Judge of this Court to recuse himself from the case and because Petitioner and his then counsel did not so move, Petitioner has waived the determination of this issue. Although the statements in the *Murvin & Meier Oil Company* case and in the present case raise the eyebrows of this Court concerning the propriety of the Honorable Robert L. Holland, Jr., remaining on the case, it is clear from the record and from the statements of the attorneys who represented the Petitioner that the Petitioner waived his right to challenge the Honorable Robert L. Holland, Jr., because the Honorable Robert L. Holland, Jr., informed Petitioner and his counsel of the potential for judicial recusal and Petitioner and his counsel did not seek that recusal or disqualification.

Ineffective Assistance of Counsel

The Petitioner next presented evidence that he was denied the effective assistance of counsel pursuant to the Sixth Amendment of the Constitution of the United States of America as defined by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The Petitioner alleged that George J. Cosenza failed to make a reasonable investigation and failed to move for the disqualification of the Honorable Robert L. Holland, Jr.; that Jerry Blair failed to make a reasonable investigation and that the actions of Mr. Blair were outside the broad range of

professionally competent assistance; and that Rocco E. Mazzei failed to make a reasonable investigation and failed to move for the disqualification of the Honorable Robert L. Holland, Jr.

In *State v. Miller*, Justice Cleckley, writing for the Supreme Court of Appeals of West Virginia, stated the standard for assessing the efficiency of counsel. 194 W.Va. 3, 459 S.E.2d 114, (1995). “*Strickland* requires the defendant to prove two things: (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.’ ” *Id.* at 15, 126 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068).

Justice O’Connor, writing for the majority in *Strickland*, identified the basic duties of counsel as follows:

- (1) “A duty of loyalty, a duty to avoid conflicts of interest,” *Id.* at 688, 2065;
- (2) “[A] duty to advocate the defendant’s cause, and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution,” *Id.* at 688, 2065;
- (3) “[A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process,” *Id.* at 688, 2065; and
- (4) “[A] duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691, 2066.

Justice Kennedy, writing for the majority in *Missouri vs. Frye*, 132 S.Ct. 1399 (2012), at page 1408 added the “duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” 132 S.Ct. 1399 (2012), 1408.

In *State v. Miller*, Susan Miller, the defendant, was convicted in the Circuit Court of Pleasants County of the offense of battery. On direct appeal, Miller asserted that her trial counsel was ineffective because “her trial counsel failed to offer instructions on her affirmative defense of self-defense and did not make timely and appropriately specific objections to the trial

court's general charge or to those instructions submitted by the prosecution." 194 W.Va. 3, 15, 459 S.E.2d 114, 126. Although the *Miller* Court agreed with the defendant that "such a maneuver is indicative of the lack of a trial strategy and '[n]o competent defense attorney would go to trial without first formulating an overall strategy,'" the *Miller* Court did not reach the issue of whether the defendant's counsel was ineffective because the issue was presented on direct appeal without an adequate record to determine the merits of the ineffective assistance of counsel claim. *Id.* at 15-16, 126-127 (quoting Welsh S. White, "Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care," 1993 U.Ill.L.Rev. 323, 356).

In *State ex rel. Shelton v. Painter*, Shane Painter, the appellant, was convicted, in the Circuit Court of Ohio County, of first degree murder without a recommendation of mercy. 221 W.Va. 578, 655 S.E.2d 794 (2007). After a direct appeal was denied, Painter obtained *habeas* counsel. Painter raised two ineffective assistance of counsel claims in his revised and amended petition: (1) his "trial counsel violated the duty of loyalty and advocacy during closing argument;" and (2) his "trial counsel's admission of the appellant's guilt when combined with trial counsel's comments regarding mercy constituted ineffective assistance of counsel." *Id.* at 582, 798, 585, 801. Applying *Strickland*, the *Painter* Court found that "defense counsel's performance did not adversely affect the outcome of the guilty phase of the trial," but that "defense counsel was ineffective at the penalty phase of the trial in that the result of the penalty phase was unreliable as contemplated by *Strickland* and *Miller*." *Id.* at 586, 802. As a result of its findings, the *Painter* Court granted Painter a limited new trial only on the penalty issue.

During trial, Jerry Blair made failed to offer any jury instructions and offered the following closing arguments on behalf of Petitioner:

So you know, I don't know why Gregg Smith went after him with a hammer. I don't know, none of us know, you know, what he had been through for the year

prior. Who knows? But I know that he was charged with a felony and a jury found him not guilty and he could not get what he needed. If somebody had prosecuted him that had battered him, we don't know what would have happened. We don't know if that would have stopped the things between these people or not. The fact is he was battered and the battery went on. Yeah, he lost his leg, but he had not lost his leg when he was a batterer. . . .

They have to prove to you, the state does, beyond a reasonable doubt, beyond a reasonable doubt. You know, you can't just say I dislike Gregg Smith and find him guilty of two counts of malicious assault and wanton endangerment. You can't dislike him and do that. You can't dislike me and not do that. You have got to have proof that in your own heart there is no reasonable doubt that he had the maliciousness to do this, that he had intent to kill Tom Smith. I think you all know that. And I am sorry if it sounds like I am yelling at you, but this is a lot of pressure here, you know. This man's life is in your all's hands through me trying to communicate to you. His whole future is in your hands and, yes, it makes us a little bit nervous when we have to defend this. I think the case is overcharged. You know, did he really --? Should we have charged him with attempted murder? You have seen the video. You know, is this attempted murder? Is it even malicious assault? It might have been attempted malicious assault with a hammer.

Now as far as, as far as the wanton endangerment goes here we have the gun then we see Tristan coming over. I don't recall, and you all are the ones that matter, not me, but I don't recall there was any evidence that Tristan was outside whenever the gun went off. You know, what about Emily? I am sorry, not Emily. Edith, what about little Edith who did testify? She was on the porch. You know, they could have charged him with wanton endangerment of her. But they did not. They charge wanton endangerment of Tristan. . . .

Gregg Smith was honest about the 911 call even though he was wrong. He stated Tom went for the hammer and he took it away from him, or something to that effect. That was not on the video. It is not true. Was he lying to 911? I mean, think what I am saying here. Would he lie about going for the hammer or not going for the hammer? Would he intentionally say to police and troopers what he was saying - I shot him? I am Gregg Smith. I shot Tom Smith. No, I don't think that makes any sense. If you listen to that 911 tape, you will hear how excited, what an excited state he is in. His breathing is about as loud as his words. . . .

No, you are not, you are not across the street from my house. See what happens when people are, they are so upset they are out of their minds? He was obviously across the street from his house. Many people are in just a crazy state and that is what happens, you know, when things go this far. It is a tragedy but I don't know of somebody that we can point a finger at and put it on them.

And I respectfully suggest to you that Gregg Smith is not guilty of what he is charged with. He is guilty of stupidity. He is guilty of something, but he is not guilty of what he is charge with folks. Thank you very much.

Applying the case of *State ex rel. Shelton v. Painter*, this Court finds that “it is unlikely that a reasonable lawyer would have acted, under the circumstances, as trial counsel did in this case.” 655 S.E.2d 794, 801. This case presented counsel with the opportunity to argue excuse, justification, and provocation, in addition to arguing that Petitioner attacked Tom Smith in self-defense. This satisfies the first prong of *Strickland* and *Miller*. However, this Court does not find that the Petitioner has established the second prong of *Strickland* and *Miller*, that “but for defense counsel’s unprofessional errors, the result of the proceedings would have been different.” *Id.* This Court does not believe that other more competent, more professional, or more skillful attorneys would have achieved a different result with any reasonable probability, other than as to the double jeopardy claim because of the overwhelming weight of the evidence against the Petitioner. Therefore, this Court finds the results of the trial court reliable and rejects the Petitioner’s claim of ineffective assistance of counsel.

Double Jeopardy

Petitioner was convicted of one count of **Malicious Assault** because the jury found that Petitioner feloniously, willfully, maliciously, deliberately, and unlawfully did shoot, one Thomas F. Smith with a shotgun with intent to maim, disfigure, disable or kill the said Thomas F. Smith; against the peace and dignity of the State; and Petitioner was convicted of one count of **Wanton Endangerment Involving a Firearm** because the jury found that Petitioner wantonly performed an act with a firearm in a manner which created a risk of death or serious bodily injury to, one T.L..PC., a minor, with a shotgun, against the peace and dignity of the State.

The evidence at trial was that Petitioner attacked Thomas F. Smith with Thomas F. Smith’s own hammer, and then the two struggled to the rear of Petitioner’s car where Petitioner

had a loaded shotgun. Petitioner and Thomas F. Smith then struggled over the loaded shotgun, which discharged into the leg of Thomas F. Smith. The State of West Virginia proved at trial that T.L.P.C., a minor, was also present during the struggle over the shotgun and the subsequent firing of the shotgun and used the presence of T.L.P.C. to charge and convict Petitioner of **Wanton Endangerment Involving a Firearm** in addition to charging and convicting Petitioner of **Malicious Assault**. Neither Petitioner's trial counsel, Jerry Blair, nor his sentencing and appellate counsel, Rocco E. Mazzei, raised the issue of double jeopardy. However, Petitioner's *habeas* counsel, Matthew T. Yanni, correctly raised and sought relief under this issue.

On this issue, Petitioner raised his constitutional rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and under the Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution. Petitioner relies on the case of *State v. Wright*. In *Wright*, Robert Jack Wright appealed his convictions obtained in the Circuit Court of Hampshire County on the charges of malicious assault, attempted murder, and wanton endangerment with a firearm because "in this case, both convictions [were] based on one act involving the use of a firearm." *Id.* at 551, 638. The incident occurred outside the home of the victim, and involved Wright pulling a gun from his pants that discharged and injured the victim. Wright sought review before the West Virginia Supreme Court of Appeals and alleged that "the double jeopardy prohibition applies to his convictions and punishments for both malicious assault and wanton endangerment." *Id.* at 552, 639. After applying the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932), the *Wright* Court found that

wanton endangerment is a lesser included offense because it would have been impossible for Mr. Wright to have committed malicious assault without first having committed wanton endangerment. Based on our holding, we find that the circuit court erred in convicting and sentencing Mr. Wright to both malicious assault and wanton endangerment. Rather, Mr. Wright's conviction and sentence

should have been limited to attempted murder and either malicious assault or wanton endangerment.

State v. Wright, 200 W. Va. 549, 553-554, 490 S.E.2d 636, 641(1997).

Based upon the holding in *State v. Wright*, the only question for this Court is whether the presence of T.L.P.C. when the shotgun blast injured Thomas F. Smith is sufficient to uphold the convictions for both **Malicious Assault** and **Wanton Endangerment Involving a Firearm**.

In order to establish a double jeopardy claim, a defendant must first present a *prima facie* claim that double jeopardy claims have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant.

State v. Sears, 196 W.Va. 71, 75, 468 S.E.2d 324, 328 (1996). In this case, the Petitioner relies on the trial transcript to show that Petitioner committed only one action with the shotgun and that he has subsequently been convicted of **Malicious Assault** and the lesser-included offense of **Wanton Endangerment Involving a Firearm**. This Court finds that this is a nonfrivolous claim and that the State of West Virginia bears the burden to show that double jeopardy principles do not bar the imposition of multiple punishments on the Petitioner for committing a single act. So far, the State of West Virginia has not met its burden and has simply suggested that Petitioner presented this Court with a novel theory. This is not the case. In fact, the Supreme Court of West Virginia has taken appeals dealing with the commission of a single act with multiple victims present since at least 1984.

In *State v. Collins*, Leon Collins was convicted of two counts of attempted aggravated robbery, involving two clerks at a store. 174 W.Va. 767, 329 S.E.2d 839 (1984). Although the Supreme Court of West Virginia did not apply *Blockburger*, it found it

impossible to conclude from either the common law or W.Va. Code, 61-2-12, that an attempt to rob a store by presenting a firearm and leaving without taking any

property can, in light of double jeopardy principles, result in multiple convictions of attempted robbery for each clerk present in the store.

Id. at 773-74, 846. This Court distinguishes *Collins* from cases where multiple acts accompanied multiple victims. See *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980), *State v. Flint*, 171 W.Va. 676, 301 S.E.2d 765 (1983), *State ex rel. Lehman v. Strickler*, 174 W.Va. 809, 329 S.E.2d 882 (1985), and *State v. Myers*, 229 W.Va. 238, 728 S.E.2d 122 (2012).

In *State ex rel. Watson v. Ferguson*, David Wesley Watson killed a woman and three children in Wayne County by striking each with multiple blows of a tire lug wrench. In analyzing the double-jeopardy implications, the Supreme Court of Appeals of West Virginia found that

[h]ere there is no contention that the multiple homicides occurred as a result of a single volitive act on the part of the defendant, but rather each was killed by sequential acts of the defendant moving from one victim to another, striking them with the tire lug wrench. Thus, where multiple homicides occur even though are in close proximity in time, if they are not the result of a single volitive act of the defendant, they may be tried and punished separately under the double jeopardy clause of Article III, Section 5 of the West Virginia Constitution.

Id. at 352-53, 448.

Therefore, because all evidence before this Court is that the firing of the shotgun that injured Thomas F. Smith was a single volitive act and because the State of West Virginia has not borne its burden to show otherwise, this Court finds that convicting the Petitioner of **Malicious Assault and Wanton Endangerment Involving a Firearm** is a violation of Petitioner's constitutional rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and under the Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution. Accordingly, one conviction and its sentence must be dismissed. Therefore, this Court **Orders** that the State of West Virginia must dismiss one of these two

convictions – malicious assault or wanton endangerment involving a firearm – within ten (10) days of the date of this order. Should the State of West Virginia not dismiss one of these two convictions within ten (10) days of the date of this Order, then the Petitioner will have the option to choose between malicious assault and wanton endangerment involving a firearm to be the conviction and sentence which will be dismissed. **IT IS SO ORDERED.**

It is further **Ordered** that the Clerk of this Court shall provide a certified copy of this Order to the attorneys in this matter at the following addresses:

For the State:

Steven A. Jones, Esq.
Ritchie County Prosecutor
Ritchie County Courthouse
Harrisville, WV 26362

For the Defendant:

Matthew T. Yanni, Esq.
Yanni Law Firm
211 ½ West Burke St.
Martinsburg, WV 25401

ENTER: *November 7, 2013*

Larry V. Starcher
Special Judge Larry V. Starcher

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: Rose Ellen Cox

Ritchie County of West Virginia

ENTERED ON 11/12/2013

IN Co Order Book No. 47

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Angela H. Copeland
Circuit Clerk
Deputy

14-1255

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: RECALL OF THE HONORABLE LARRY V. STARCHER TO ACTIVE SERVICE TO PRESIDE IN THE CIRCUIT COURT OF RITCHIE COUNTY, THIRD JUDICIAL CIRCUIT, IN THE PROCEEDING OF GREGG SMITH V. DAVID BALLARD, WARDEN, CASE NO. 11-P-19

WHEREAS, the Honorable Timothy L. Sweeney, Judge of the Third Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals that he wishes to recuse himself voluntarily from presiding in the above-styled proceeding; and

WHEREAS, the Chief Justice, upon review of the reasons for the recusal, deems the same to be warranted;

IT IS, THEREFORE, ORDERED, that the Honorable Larry V. Starcher, Senior Status Justice, be, and he hereby is, recalled for temporary assignment to the Circuit Court of Ritchie County, in the Third Judicial Circuit, under the provisions of Article VIII, §§ 3 and 8 of the Constitution of West Virginia and West Virginia Code § 51-9-10 for the purpose of presiding in said matter; and

IT IS FURTHER ORDERED, that the Circuit Clerk of Ritchie County record this Order in the Office of the said Clerk and provide copies of the same to all parties of record or their counsel; and

IT IS FURTHER ORDERED, that the Circuit Clerk of Ritchie County forward to the Honorable Larry V. Starcher (3127 North Greystone Drive, Morgantown, WV 26508; telephone no. 304-541-3304) copies of such documents and materials in the Clerk's Office as directed by him.

ENTERED: JANUARY 20, 2012


MENIS E. KETCHUM
Chief Justice

Adm. O.
ENTERED IN BOOK 14 PAGE 80
DATE 1-23-12